

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI**

COSTAR GROUP, INC., COSTAR REALTY  
INFORMATION, INC., and LOOPNET, INC.,

Plaintiffs,

v.

XCELIGENT, INC.,

Defendant.

Case No. 4:16-cv-01288-FJG

**DEFENDANT XCELIGENT, INC.'S MOTION TO DISMISS**

COMES NOW defendant Xceligent, Inc. and moves the Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Complaint of Plaintiffs CoStar Group, Inc., CoStar Realty Information, Inc., and LoopNet, Inc. in its entirety for failure to state a claim upon which relief can be granted because the Complaint is barred by a Federal Trade Commission order dated August 29, 2012 that concerns CoStar Group's acquisition of LoopNet and required LoopNet's divestiture of Xceligent (the "FTC Order").<sup>1</sup> The FTC Order, which binds Plaintiffs, specifically (i) is intended to enable Xceligent to expand and increase its effectiveness as a competitor to CoStar and LoopNet, (ii) forbids Plaintiffs from "[d]irectly or indirectly" prohibiting or restricting commercial real estate brokers from providing their listing information or data to Xceligent, and (iii) prohibits Plaintiffs from pursuing litigation seeking relief inconsistent with the terms or purposes of the FTC Order.

Independent of the FTC Order, Plaintiffs fail to state a claim for relief on two of the four causes of action asserted. The claim under the Computer Fraud and Abuse Act ("CFAA") fails

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<sup>1</sup> The FTC Order is attached as Exhibit F to Xceligent's Suggestions in support of its motion and as Exhibit 1 to Xceligent's request for judicial notice, both of which are filed concurrently herewith.

because the Complaint contains only a formulaic recitation of the elements of a cause of action and fails to allege a cognizable “loss” — *i.e.*, one based on “interruption of service” or “actual computer impairment.” *See* 18 U.S.C. §§ 1030(a)(5)(c), 1030(e)(11). The claim under the Digital Millennium Copyright Act (“DMCA”) fails because Plaintiffs do not allege that Xceligent removed, altered, and/or replaced “copyright management information” as defined in the statute. *See* 17 U.S.C. § 1202(c)(3).

Contemporaneous with the filing of this motion, Xceligent is filing its Suggestions in support further explaining why the Complaint should be dismissed.

WHEREFORE, Xceligent hereby respectfully requests that the Court grant Xceligent’s Motion to Dismiss based on the arguments put forth in Xceligent’s Suggestions in support of its Motion to Dismiss.

Dated: January 27, 2017

Respectfully Submitted,

POLSINELLI PC

/s/ Robert A. Henderson

ROBERT A. HENDERSON #28566

JOHN M. TYNER #58864

AMY D. FITTS #61460

900 W. 48<sup>th</sup> Place, Suite 900

Kansas City, Missouri 64112

(816) 753-1000

Fax: 816-753-1536

[rhenderson@polsinelli.com](mailto:rhenderson@polsinelli.com)

[jtyner@polsinelli.com](mailto:jtyner@polsinelli.com)

[afitts@polsinelli.com](mailto:afitts@polsinelli.com)

Brian H. Polovoy (Pro Hac Vice)

John Gueli (Pro Hac Vice)

Thomas R. Makin (Pro Hac Vice)

SHEARMAN & STERLING LLP

599 Lexington Avenue

New York, New York 10022

[bpolovoy@shearman.com](mailto:bpolovoy@shearman.com)

[jgueli@shearman.com](mailto:jgueli@shearman.com)

[Thomas.makin@shearman.com](mailto:Thomas.makin@shearman.com)

ATTORNEYS FOR DEFENDANT  
XCELIGENT, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court this 27th day of January, 2017, to all the following counsel of record:

Eric M. Anielak  
Elizabeth Fessler  
Shook, Hardy & Bacon L.L.P.  
2555 Grand Boulevard  
Kansas City, MO 64108  
*Attorneys for Plaintiffs*

Nicholas J. Boyle  
C. Bryan Wilson  
Matthew H. Blumenstein  
Jonah E. Perlin  
Williams & Connolly LLP  
725 12th Street, N.W.  
Washington, DC 20005  
*Attorneys for Plaintiffs*

/s/ Robert A. Henderson  
ATTORNEY FOR DEFENDANT

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